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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43614
Plaintiff-Respondent,)	
)	Shoshone County Case No.
v.)	CR-2015-517
)	
SHAWN CLARK,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Clark failed to establish that the district court abused its discretion, either by imposing a unified sentence of 20 years, with 12 years fixed, for one count of sexual battery of a minor child 16 or 17 years of age, or by denying his Rule 35 motion for reduction of his sentence?

Clark Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Clark pled guilty to one count of sexual battery of a minor child 16 or 17 years of age and the district court imposed a unified sentence of 20 years, with 12 years fixed. (R., pp.50-55.) Clark filed a notice of appeal timely from the judgment of conviction.

(R., pp.56-59.) He also filed a timely Rule 35 motion for reduction of his sentence, which the district court denied. (Rule 35 Motion; Order Denying I.C.R. 35 Motion (Augmentations).)

Clark asserts his sentence is excessive due to his willingness to participate in treatment, his low risk to re-offend, and his status as a first time felon. (Appellant's brief, pp.4-5.) The record supports the sentences imposed.

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant's entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. Id. (citing State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). To carry this burden the appellant must show that the sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable, however, if it appears necessary to achieve the primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id.

The maximum prison sentence for sexual battery of a minor child 16 or 17 years of age is 25 years. I.C. § 18-1508(1)(c). The district court imposed a unified sentence of 20 years, with 12 years fixed, which falls well within the statutory guidelines. (R., pp.50-55.) At sentencing, the district court articulated the correct legal standards

applicable to its decision and also set forth its reasons for imposing Clark's sentence. (8/17/15 Tr., p.35, L.19 – p.37, L.14.) The state submits that Clark has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

Clark next asserts that the district court abused its discretion by denying his Rule 35 motion for reduction of his sentence because he wishes to continue his counseling and volunteer as a counselor for others. (Appellant's brief, pp.5-6.) If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho, 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Clark must "show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." Id. Clark has failed to satisfy his burden.

Clark provided one new piece of information in support of his Rule 35 motion; he stated that he would like to volunteer as a counselor for others in his situation. (1/20/16 Tr., p.7, L.24 - p.8 L.7.) This is not "new" information that warrants a reduction of sentence. At the hearing on Clark's Rule 35 motion, the state addressed Clark's long history of sexually abusing the victim, the fact that Clark was a law enforcement officer during the time of the abuse, and that, had the victim not come forward, the abuse would likely still be continuing. (1/20/16 Tr., p.15, L.12 – p.16, L.20.) The district court also added that the sentence imposed was appropriate for the protection of society, deterrence to Mr. Clark and others, and for the nature of the crime and conduct of Mr.

Clark. (1/20/16 Tr., p.17, Ls.11–23.) The state submits that Clark has failed to establish any basis for reversal of the district court's order denying his Rule 35 motion, for reasons more fully set forth in the attached excerpt of the Rule 35 hearing transcript, which the state adopts as its argument on appeal. (Appendix B.)

Conclusion

The state respectfully requests this Court to affirm Clark's conviction and sentence and the district court's order denying Clark's Rule 35 motion for reduction of sentence.

DATED this 3rd day of May, 2016.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 3rd day of May, 2016, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

ANDREA W. REYNOLDS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

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1 thing that happens in families. That's a problem, but
2 that's not something that Shawn decided to have happen
3 in his life. It's something that Shawn now looks at
4 with shame. It's something that he acknowledges has to
5 change. It's something that he acknowledges now is
6 wrong. There's no way that you can have this crime
7 occur and have a better response than Mr. Clark has
8 brought.

9 You know, one last thing that this
10 evaluator from the Fourth District -- and by the way
11 the evaluation was done in the Fourth District because
12 that's where Shawn is living now. The Fourth District
13 is a busy district. But the one thing that I see --
14 and the last thing I want to leave the Court with -- is
15 the statement that Shawn should have no problem being
16 supervised. That's a quote out of the psychosexual
17 evaluation. He is somebody who's amenable to
18 treatment. He's somebody who should have no problem
19 following the rules of probation. And, Your Honor, I'd
20 ask the Court grant him probation.

21 You know, there's more to Shawn than
22 what's occurred here. He has done everything that he
23 can to try to make this right. And the goals of
24 sentencing, Your Honor, just don't require under these
25 circumstances that we take somebody who was victimized

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1 In reviewing all of the material, how many instances
2 there were. Certainly listening to the victim,
3 Ms. Clark, here today, there were many instances. And
4 your conduct, your actions, Mr. Clark, have obviously
5 had a severe impact on her emotionally and physically,
6 an impact that will obviously be with her the rest of
7 her life. And that is a factor I'm going to take into
8 account in sentencing.

9 The other thing that is a factor is that
10 you were in a position of trust, as she stated. You
11 were a father figure. An additional position of trust
12 in your case in that you were a law enforcement officer
13 as well.

14 The goals of sentencing in this case are
15 protection of the public, deterrence to you and others,
16 rehabilitation, and punishment. And I think punishment
17 is a valid sentencing goal in this case. We have the
18 psychosexual evaluation that I am certainly going to
19 consider. It concludes that you're a low risk to
20 reoffend. I'm not sure how that squares with the fact
21 that you did reoffend many times over a several-year
22 period. But I guess we'll take the psychosexual
23 evaluation at face value.

24 We've had letters from your relatives,
25 friends, and acquaintances, and as is typical in these

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1 and didn't appreciate the wrongfulness of this conduct
2 and simply throw them away. He is amenable to
3 treatment. He's not a risk to reoffend. And for those
4 reasons, Your Honor, we're asking that the Court place
5 him on probation.

6 In the alternative, if the Court wants
7 more information, more assurances that he would be safe
8 in society, I'd ask you that in the alternative the
9 Court consider retaining jurisdiction.

10 Thank you.

11 THE COURT: Thank you.

12 Before I pronounce sentence, Mr. Clark, is
13 there anything you'd like to say?

14 THE DEFENDANT: I just want to -- I just want
15 to say I'm sorry for everything I've done, all the
16 problems I've caused. I really hope for forgiveness
17 from my family.

18 THE COURT: Thank you.

19 The presentence report recommends
20 imprisonment. It's noted in the report that this is
21 Mr. Clark's first offense of any nature. But when you
22 look at it, it's not simply one offense. It's conduct
23 that occurred multiple times over multiple years. So
24 in a sense there are several offenses. This is the
25 first charged offense, however. It's not clear to me,

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1 cases, there's a disbelief that you would have been
2 capable of this kind of conduct. That's not unique.
3 That's fairly typical in these kinds of cases. The
4 statement that Ms. Clark made is that -- one of them
5 that I noted was that this is your burden now, not
6 hers, and you deserve to go to prison. I agree with
7 her.

8 Given the foregoing sentencing factors,
9 the material I've reviewed, the things I've considered
10 here today, the sentence I'm going to impose is a 20-
11 year unified sentence with 12 years fixed. You will
12 receive credit for any time served. So it's 12 years
13 fixed, 8 years indeterminate, for a total not to exceed
14 20.

15 Do you know how much credit for time
16 served he has, Mr. Walsh?

17 MR. WALSH: I don't, Your Honor.

18 THE COURT: Court costs of \$545.50 are
19 imposed. Additionally you'll reimburse the Department
20 of Correction for the cost of the presentence report
21 not to exceed \$100.

22 Anything else, counsel?

23 MS. OXENDINE: Your Honor, we would ask that
24 the no contact order be extended an additional two
25 years from today's date.

APPENDIX B

13

1 we can think about 19-2511, 19-2521, and also other
2 case law.

3 One of the -- in the great body of
4 jurisprudence, one of the most important factors for
5 the Court to consider, when looking at the defendant,
6 his characteristics. When we make that particularized
7 determination in each case as to what the appropriate
8 criminal punishment should be, one of those factors is
9 his amenability to treatment, his rehabilitative
10 capacity, and his general character. And part of
11 that -- part of that is the acknowledgement of
12 responsibility. You know, that factor is made very
13 explicit in federal jurisprudence. And obviously
14 that's not controlling here, and I don't mean to
15 suggest that. But nonetheless that kind of idea runs
16 throughout all common law systems that, when we assess
17 the nature and circumstances of the crime, the impact
18 on community, and the character of the defendant,
19 that's one of the very important things to look at.

20 Now, as you look at this case, you really
21 can't find a defendant who would more exemplify
22 acceptance of responsibility than -- and acknowledgment
23 of the wrongfulness of his conduct than Mr. Clark has.
24 Through the first initial stage, from the time he was
25 called out on what had occurred on his criminal

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1 We're also not seeing a request that he be
2 put on probation or that you simply give him one year
3 fixed and let him go. He still acknowledges that he
4 has earned this. He would still have 19 years over his
5 head if he did foul up on parole. So I think that this
6 is a reasonable request, and I think that there are
7 good reasons for it. And I think that for those
8 reasons the Court should grant relief as requested.

9 THE COURT: Thank you.
10 All right, Ms. Oxendine.

11 MS. OXENDINE: Thank you, Your Honor.

12 Your Honor, the State is opposed to
13 Mr. Clark's motion for a Rule 35 reduction in sentence.
14 As the Court will recall and the PSI outlined at the
15 previous sentencing in this matter, the victim in this
16 case suffered 12 years of abuse from Mr. Clark, some of
17 which occurred while Mr. Clark was law enforcement.
18 Mr. Clark was not law enforcement at the time he was
19 caught in this case, and he only sought treatment after
20 he got caught and the victim finally had enough courage
21 to disclose the abuse that had been ongoing for most of
22 her life.

23 The sentence, as originally imposed, was
24 not excessive under the facts in this case and
25 considering the goals of sentencing. Not only

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1 conduct, he immediately confessed. He's immediately
2 treated his wife, the victim in the case, absolutely in
3 every way that we would expect with this conduct having
4 occurred. You know, he responded appropriately by
5 immediately getting into treatment, and even right now,
6 all the way up through this process, you know, you
7 still hear him even while he's in prison for 20 years,
8 still talking about treating him. I think that that's
9 an important facet, and that's a new piece of
10 information for the Court is how he has continued to
11 respond. You can't fake that. A defendant can't hold
12 his breath for that long. At some point your true
13 colors show, and we are seeing Mr. Clark's true colors.

14 I think that that goes to both the victim,
15 making sure the victim's protected and respected. But
16 also it goes to Mr. Clark's conduct. You know, he -- I
17 won't belabor the point. The Court heard testimony. I
18 think that the testimony was laid out pretty clearly.
19 I could talk about each one of those. But I think that
20 that really is the key piece here. That's the key
21 difference. We don't normally see that. We see angry
22 letters from prisoners and things like that.

23 THE DEFENDANT: Cutting out on me.

24 MR. WALSH: Thank you, Shawn.

25 We're not seeing that from Mr. Clark.

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1 deterrence of the defendant but of others, punishment
2 for the defendant, protection of society, and then
3 rehabilitation. The defendant today has presented no
4 new information that would cause any reason to believe
5 that the sentence was not appropriate as originally
6 given. The defendant is a sex offender. He began his
7 conduct when the victim was eight years old and
8 continued a pattern of abuse. Therefore, Your Honor,
9 he is a high risk to reoffend. And the victim in this
10 case will be impacted for the rest of her life.

11 Mr. Clark sits before the Court today and
12 certainly argues that he should be -- he should receive
13 leniency and a sentence of 1 year plus 19 years
14 indeterminate. Your Honor, the sentence as originally
15 imposed was not excessive. The facts and circumstances
16 leading up to his plea of guilty indicate that this
17 likely would have continued but for the victim coming
18 forward and finally disclosing her abuse. And as a
19 result, Your Honor, we ask that the defendant's Rule 35
20 motion be denied.

21 Thank you.

22 THE COURT: Thank you.

23 Anything else, Mr. Walsh?

24 MR. WALSH: No, Your Honor. Thank you.

25 THE COURT: The motion is a motion pursuant

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1 to Criminal Rule 35, which is a request for leniency.
2 Mr. Clark has put forward in these proceedings his --
3 the basis for his request, as he stated, the primary
4 one being, as I understand it, that he would like to be
5 able to act as a counselor and assist others and obtain
6 rehabilitation outside the confines of prison. And
7 those all go to the sentencing goal of rehabilitation,
8 which is certainly a factor in sentencing. But that
9 really was not the primary factor that caused me to
10 impose the sentence that I did.

11 Protection of the public is the primary
12 overriding goal. I believe I stated that at the time
13 of sentencing. Deterrence to Mr. Clark and to others
14 is obviously a goal also, as is punishment in this case
15 given the nature of the crime and conduct of Mr. Clark.

16 The sentence that I imposed I think
17 reflects that conduct and the criminal acts he
18 committed. And I appreciate the things you're doing,
19 the reasons for the request, Mr. Clark, but I believe
20 the sentence that I imposed was right for the reasons I
21 imposed -- for the reasons I stated at the time I
22 imposed it. And I continue to believe that is the
23 correct sentence.

24 So I am going to deny the request for Rule
25 35 relief. Will you prepare the order, please,

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1 Ms. Oxendine?

2 MS. OXENDINE: I will, Your Honor.

3 THE COURT: All right. Anything else,
4 Mr. Walsh?

5 MR. WALSH: No, Your Honor. Thank you.

6 THE COURT: All right. That will conclude
7 the hearing. Thank you, Mr. Clark.

8 (Proceedings concluded at 11:37 a.m.)
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